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In the Supreme Court of the United States,

OCTOBER TERM, A. D. 1890.

No. 1539.

SYLVESTER H. KNEELAND, *Appellant*,
v.
AMERICAN LOAN AND TRUST COMPANY OF BOSTON ET AL.

Appeal from the Circuit Court of the United States for the District of Indiana.

MOTION TO ADVANCE THE CAUSE.

Now come the American Loan and Trust Company of Boston, and E. B. Phillips, trustee, appellees herein, by their counsel, and move to advance the cause for final hearing, and set forth the following ground in support of such motion: —

This appeal was taken by Sylvester H. Kneeland as purchaser under foreclosure sales of the divisions of the Toledo, Cincinnati & St. Louis Railroad, known respectively as the Toledo and St. Louis divisions, and as trustee and agent for holders of bonds constituting a lien thereon, from a decree of the Circuit Court for the district of Indiana, rendered Sept. 27, 1890, awarding to the appellees severally the payment of certain amounts for rentals of cars and locomotives used by the receivers of the railroad, pending foreclosure proceedings. This cause, together with the causes involved in an appeal taken by the said Kneeland as to the claims of other creditors for car rentals, numbered 1540 on the docket of this court, was fully argued and determined upon the merits at the last term: *Kneeland* v. *American Loan and Trust Company* and *Kneeland* v. *Ballou*, 136 U. S. 89. By the judgment of this Court therein the causes were remanded to the Circuit Court, with directions to strike out all allowances for rentals prior to Dec. 1, 1883, and to allow the rentals as fixed for the time subsequent thereto. The mandates

of this Court were filed in the Circuit Court, and on June 21, 1890, a decree was entered in that court in accordance with the mandates, as to all the appellees therein, excepting the American Loan and Trust Company of Boston, and E. B. Phillips, trustee, from which decree said appeal numbered 1540 was duly taken, and on Sept. 27, 1890, a further decree was entered in that court in accordance with the mandates, as to the last-named appellees, from which decree this appeal was taken. This decree was as follows: —

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

MAY TERM, 1890. Sept. 27, A. D. 1890.

Before HONORABLE WILLIAM A. WOODS, *Judge*.

THE CENTRAL TRUST COMPANY OF NEW YORK ET AL. *v.* THE TOLEDO, DELPHOS & BURLINGTON RAILROAD COMPANY ET AL.	No. 7706, Chancery.
EDWARD F. LEONARD ET AL. *v.* THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY ET AL.	Nos. 7814 and 7815, Chancery. Consolidated Causes.
THE CENTRAL TRUST COMPANY OF NEW YORK ET AL. *v* THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY ET AL.	

"This day again come the parties to the above-entitled causes, and the several parties to the decrees hereinafter named, including the various intervening petitioners and other claimants for rental and repairs of locomotives, and for cars destroyed; and comes also Sylvester H. Kneeland, purchaser at the foreclosure sales heretofore had in the above-entitled causes of two divisions of the Toledo, Cincinnati & St. Louis Railway Company, known as the Toledo Division and the St. Louis Division respectively, and as trustee and agent for the mortgage bondholders of said respective divisions. And it appearing to the Court that on the twenty-first day of June, A. D.

1890, a final decree was entered by this Court in the above-entitled causes in accordance with mandates of the Supreme Court of the United States as to all the parties thereto excepting the intervening petitioners, the American Loan and Trust Company of Boston, and E. B. Phillips, trustee, who, not being present or represented by counsel at the hearing, were expressly excepted from said decree.

"And it appearing to the Court that on the second day of June, A. D. 1890, mandates of the Supreme Court of the United States in the case of Sylvester H. Kneeland *v.* The American Loan and Trust Company of Boston and others, and in the case of Sylvester H. Kneeland *v.* George William Ballou, trustee, said cases being numbered respectively 252 and 1537, of the October Term, A. D. 1890, were filed in this court reversing the final decrees heretofore rendered in the above-entitled causes concerning the allowance of car rentals on April 5, A. D. 1886, and Nov. 9, 1889, respectively, with costs.

"And it further appearing to the Court that each of said mandates contains an order and direction in the words and figures following, viz.: 'And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to strike out all allowances for rental prior to Dec. 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent thereto'; and thereupon the said Sylvester H. Kneeland, as such purchaser, trustee, agent and bondholder as aforesaid, having this day filed herein his motion in writing, praying a reference to a master, upon the grounds and for the purposes in such motion set forth, and the Court having fully considered such motion, and the mandates and decrees aforesaid, as well as the reports of the master and the schedules accompanying the same upon which said decrees of April 5, 1886 and Nov. 9, 1889 were entered, it is thereupon ordered that such motion for reference be, and the same is hereby, denied and overruled.

"And thereupon the Court, having heard the arguments of counsel for the respective parties, and being now fully advised in the premises, doth find, from said mandates, and from said former decrees, and said master's reports and the schedules accompanying the same,

that the allowances so made to said several intervening petitioners and claimants for rentals and repairs of cars and locomotives, and for cars destroyed, for the twelve months' period from Aug. 1, 1883, to Aug. 1, 1884, should be reduced by disallowing all allowances prior to Dec. 1, 1883, and by allowing only the ensuing eight months of such period, namely, from Dec. 1, 1883, to Aug. 1, 1884; and the Court doth further find that, by reason of such reduction in the allowances for said period, said several intervening petitioners and claimants are not entitled to interest upon the amounts so remaining due for said period of eight months, and that no reduction having been made by said mandates in the allowances heretofore fixed by said decrees for the period of five months from Aug. 1, 1884, to Jan. 1, 1885, the Court doth find that said several intervening petitioners and claimants are entitled to interest on their respective allowances for said period of five months at the rate of six per cent per annum from the dates of said decrees, respectively, so fixing the amounts due to said several claimants. And the Court doth further find that, after so reducing such allowances, by striking out from said decrees of April 5, 1886, and Nov. 9, 1889, respectively, all allowances prior to Dec. 1, 1883, and after allowing interest as aforesaid on the allowances for the five months' period from Aug. 1, 1884, to Jan. 1, 1885, there remain and are due to the said American Loan and Trust Company and E. B. Phillips, trustee, intervening petitioners and claimants, for car rentals and repairs of cars and locomotives, and for cars destroyed, from the division of said railroad known as the Toledo Division and the St. Louis Division, respectively, for the eight months' period from Dec. 1, 1883, to Aug. 1, 1884, and for the five months' period from Aug. 1, 1884, to Jan. 1, 1885, the following amounts, viz.: —

To the American Loan and Trust Company of Boston.

From the Toledo Division:	
For eight months' period	$11,914 32
For five months' period	8,931 79
Interest on five months' period from April 5, 1886,	2,232 95
Total from Toledo Division	$23,079 06
From the St. Louis Division:	
For eight months' period	$11,348 40
For five months' period	8,507 89
Interest on five months' period from April 5, 1886,	2,126 97
Total from St. Louis Division	$21,983 26
Total from both divisions	45,062 32

To E. B. Phillips, *Trustee.*

From the Toledo Division:	
For eight months' period	$2,396 52
For five months' period	3,197 12
Interest on five months' period from April 5, 1886,	799 28
Total from Toledo Division	$6,392 92
From the St. Louis Division:	
For eight months' period	$2,282 69
For five months' period	3,045 39
Interest on five months' period from April 5, 1886,	761 35
Total from St. Louis Division	$6,089 43
Total from both divisions	12,482 35

"The Court doth thereupon order, adjudge and decree that the said American Loan and Trust Company and E. B. Phillips, trustee, intervening petitioners and claimants for rentals and repairs of cars and locomotives, and for cars destroyed, hereinbefore named, do have and recover the said several sums hereinbefore found due to them, and each of them respectively, from the Toledo Division, and from

the St. Louis Division of said railroad respectively, with interest thereon at six per cent from June 21, 1890, which sums so respectively found due to each of the persons hereinbefore named are hereby ordered, adjudged and decreed to be prior and paramount liens upon all the railroad property and effects of every nature and kind pertaining to each of said divisions respectively, against which the same are awarded as hereinbefore found, and prior to the rights and interest of the mortgage bondholders and purchaser of each of said divisions respectively, and of all persons claiming by, through or under them or either of them, which said sums, with interest as aforesaid, shall be paid out of the proceeds of the foreclosure sale of each of said divisions respectively prior to any distributions of said proceeds among the holders of the bonds secured by the mortgage thereon.

"It is further ordered, adjudged and decreed that the said Sylvester H. Kneeland, the purchaser of the St. Louis Division and of the Toledo Division of said railroad, at the foreclosure sales heretofore had, pursuant to the decrees of this Court, do, within sixty days hereafter, pay into the registry of this court, or to the said petitioners respectively, or to their solicitors herein, the amounts so decreed to each of said petitioners respectively as above set forth; such payment to be made in cash as a part of the purchase price due from the said Kneeland upon the sale of said divisions respectively, in accord ance with the decrees of foreclosure heretofore entered in said causes, the total amount to be paid by said Kneeland on account of the Toledo Division being the sum of $29,471.98, and the total amount so to be paid by him on account of the St. Louis Division being the sum of $28,072.69, with interest on said sums from June 21, 1890. And the Court reserves the right, in case of default in such payments as aforesaid, to resume possession of all the railroad property and effects of every nature and kind pertaining to each of said divisions respectively so sold to the said Kneeland on the terms mentioned in the order confirming such sales and approving the conveyances of such property to the said Keeland.

"To which decree as an entirety, and to each and every part and portion thereof, the Sylvester H. Kneeland, as such purchaser, and as such trustee and agent for the bondholders of said several divisions

of said railroad, and as in person a first-mortgage bondholder, and now in person and by his solicitors, excepts and prays an appeal to the Supreme Court, which is now granted.

"And pursuant to the stipulation this day made and entered into by and between the American Loan and Trust Company and E. B. Phillips, trustee, by their solicitor, Henry D. Hyde, and Sylvester H. Kneeland by R. G. Ingersoll, Clarence Brown and John M. Butler, his solicitors, it is stipulated, agreed and ordered that the appeal from this decree shall be joined and united with the appeal granted by this Court from the decree rendered and entered June 21, 1890, making the appeals from the two decrees one single appeal."

This appeal is clearly of the class contemplated by the fourth paragraph of rule 26, providing that

"Cases once adjudicated by this Court upon the merits and again brought up by writ of error or appeal may be advanced by leave of the Court on motion of either party."

As the questions embraced in this appeal and in that numbered 1540 are identical, it would seem desirable, should this motion to advance and a similar motion made in the latter appeal be sustained, that the two cases be set for hearing at the same time.

Respectfully submitted,

HENRY D. HYDE,

Solicitor for Appellees.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

SYLVESTER H. KNEELAND,
Appellant,

vs.

AMERICAN LOAN AND TRUST COMPANY ET AL.,
Appellees.

No. 1539.
MOTION TO ADVANCE.

BRIEF FOR APPELLANT.

ROBERT G. INGERSOLL,
CLARENCE BROWN,
Solicitors for Appellant.

C. G. Burgoyne, 146-150 Centre Street, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1890.

SYLVESTER H. KNEELAND, Appellant, vs. AMERICAN LOAN AND TRUST COMAANY ET AL., Appellees.	No. 1539. Motion to advance.

BRIEF FOR APPELLANT.

I.

On the third page of the brief filed herein by the appellee is the following:

> "And thereupon the said Sylvester H. Kneeland, "as such purchaser, trustee, agent and bondholder "as aforesaid, having this day filed herein his "motion in writing, praying a reference to a Mas- "ter, upon the grounds and for the purpose in such "motion set forth, and the Court having fully con- "sidered such motion, &c."

But this Court is not informed upon what grounds

the said Kneeland prayed a reference to a Master, and this Court cannot be informed without referring to the record. As a matter of fact, the said Kneeland set forth several grounds, and, among others, that no computation or report had ever been made by the Master for the several periods mentioned in the decree, and especially for those periods found by this Court to be the periods for which payments should be made.

Among other things, Kneeland set forth that the repairs, for which they asked to be paid—the cars destroyed, for which they asked to be paid—had not been shown by the reports to have been injured or destroyed within the period for which this Court decided that he was bound to pay.

Among the grounds, also, was the statement that the bondholders, with their committees, had requested the owners of the cars to remove them from the road; that their first request was made in October, 1883, and that several requests were made thereafter to the same effect; and that the owners of the cars would not remove them, but insisted on their remaining, and that the bondholders took the ground that the cars were of no use, and so notified the attorneys for the appellee.

Mr. Kneeland asked the Court below to be allowed to prove these facts, and that the case be referred for that purpose; all of which appears in the record, together with a great deal more.

The Court refused to refer the case, and thereupon the appellant excepted.

While it appears in the reports that a certain amount is allowed for a period of eight months, and a certain amount for a period of five months, we contended then, and we still contend, that the Master, in making

the reports for eight months and for five months, distributed damages, repairs and destruction over a certain period of time, and divided by the time instead of finding what actually occurred within each period.

II.

There is also another question presented in the record, and that is as to whether a decree that has been reversed bears interest from the time of its rendition in the Court below—the point being that a decree wrongfully made and afterwards reversed has hardly force enough, after the reversal, to carry interest; and the record shows, among other things, that interest was allowed by the Circuit Court. To which the appellant excepted, and from which he appealed.

III.

The record has not been printed, neither has the appellee set up such portions as will enable the Court to pass upon the motion without an examination of the record. The counsel for appellant insist that the facts are not correctly or sufficiently set up in the brief of appellee, and therefore ask that the motion be denied.

We cite the

National Bank vs. Insurance Company, 100 U. S., 43, in which it appeared that the record had not been

printed, and that counsel did not agree as to what the record contained:

> " We will not decide motions to dismiss before
> " the record is printed, where there is any ques-
> " tion about the facts on which the motion rests.
> " In order to get a decision before printing,
> " the motion papers must present the case in a
> " way which will enable us to act understandingly
> " without referring to the transcript on file."

Also *Waterville vs. Van Slyck*, 115 U. S., 290:

> " The judgment in this case is for less than
> " $5,000, but the record contains a certificate of
> " division. The motion to dismiss is on the
> " ground that this Court has no jurisdiction upon
> " such a certificate as has been filed herein. The
> " record has not been printed, and to get a de-
> " cision on a motion to dismiss before printing, the
> " motion papers must present the case in a way
> " which will enable us to act understandingly, with-
> " out referring to the transcript on file. In this
> " case we have not been furnished either with a
> " copy of the certificate on which the motion de-
> " pends or with an agreed statement of what it
> " contains. There is nothing on which we can act
> " unless we go to the transcript."

IV.

The merits involved in the present cases have not been adjudicated by this Court. This Court did de-

cide that the appellant was liable for the rentals of cars, repairs to cars, and destruction of cars, during certain periods; and thereupon the cases were remanded, to the end that decrees might be entered in accordance with the decision of this Court.

When the cases again came before the Circuit Court, the question was not whether the appellant should pay for the use of cars during the periods fixed by this Court, but the questions were, whether the cars were injured or destroyed within the periods fixed by this Court, what cars had been injured and what cars destroyed during the periods fixed, for the purpose of determining the amount to be paid by appellant to the appellee.

The appellant contended that the Court had no information, and that there was before the Court no evidence by which the facts could be established as to what cars were injured or destroyed within the periods fixed by this Court.

So that the same questions are not involved that have been decided by this Court upon the merits. The question decided by this Court, when the case was here, was as to whether appellant was liable for the payment of any rentals, or for any sum for repairs or destruction. Now the question is not whether he shall pay for repairs and destruction, but whether the repairs and destruction, for which the decree below was entered, occurred within the periods for which this Court held him liable; and this can only be determined by a reference to the evidence in the record upon the questions involved.

Consequently, we insist that this case does not come within Section 4 of Rule 26; especially when the ques-

tion as to whether a reversed decree bears interest is involved—the Court below having allowed, on a reversed decree, interest amounting to a sum far in excess of five thousand dollars.

Respectfully submitted,

ROBERT G. INGERSOLL,
CLARENCE BROWN,
Solicitors for Appellant.

Office Supreme Court U. S.
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SUPREME COURT

OF THE

UNITED STATES.

SYLVESTER H. KNEELAND,
Appellant,
vs.
THE AMERICAN LOAN AND TRUST COMPANY AND E. B. PHILLIPS, TRUSTEE, *Appellees,*

No. 1539,
October Term, 1890.

AND

SYLVESTER H. KNEELAND,
Appellant,
vs.
GEORGE WILLIAM BALLOU, TRUSTEE, ET AL., *Appellees.*

No. 1540,
October Term, 1890.

Appeals from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF APPELLANT.

BY JOHN M. BUTLER.

FRANK H. SMITH, INDIANAPOLIS.

SUPREME COURT

OF THE

UNITED STATES.

SYLVESTER H. KNEELAND, *Appellant*, *vs.* THE AMERICAN LOAN AND TRUST COMPANY AND E. B. PHILLIPS, TRUSTEE, *Appellees*,	*No. 1539, October Term, 1890.*
AND	
SYLVESTER H. KNEELAND, *Appellant*, *vs.* GEORGE WILLIAM BALLOU, TRUSTEE, ET AL., *Appellees.*	*No. 1540, October Term, 1890.*

Appeals from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF APPELLANT.

STATEMENT.

1. These two appeals are to be heard and determined as one appeal. (Stipulation, Record, pp. 26, 27.)

These appeals are prosecuted from decrees rendered

by the Circuit Court subsequent to the reversal by this Court of the original decrees in causes Nos. 252 and 1537, October Term, 1889.

By stipulation, the printed records in said causes Nos. 252 and 1537 on the Docket of this Court for the October Term, 1889, in so far as said records are applicable to these appeals, are to be taken and regarded as part of the record of these appeals without reprinting said records. (Stipulation, Record, p. 31.)

Without such stipulation this Court would, doubtless, take cognizance of the facts disclosed by those records in considering and determining these appeals.

The decision of this Court reversing the original decrees, appears in *Kneeland* v. *American Loan and Trust Company*, and *Kneeland* v. *Ballou*, 136 U. S., 89-104.

2. It may be proper to briefly restate the facts giving rise to this litigation. On January 17, 1880, the Toledo, Delphos and Burlington Railroad Company executed and delivered to the Central Trust Company of New York, Trustee, its first mortgage on all of its railroad and property extending from Toledo, Ohio, to Kokomo, Indiana, to secure the payment of $1,250,000.00 six per cent. bonds. These bonds were all immediately sold.

On July 23, 1881, the Toledo, Cincinnati and St. Louis Railroad Company executed and delivered to the Central Trust Company of New York and Thomas A. Hendricks, Trustees, its first mortgage on all its railroad and property extending from Kokomo, Indiana, to East St. Louis, Illinois, to secure the payment of $3,000,000.00 six per cent. bonds. These bonds were immediately issued and sold.

On February 25, 1882, after these two corporations

had executed and delivered their said first mortgages, and after the bonds respectively secured thereby were sold, the Toledo, Delphos and Burlington Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company were duly consolidated, the consolidated corporation taking the name of "The Toledo, Cincinnati and St. Louis Railroad Company." This consolidated company owned and operated a continuous line of narrow gauge railroad from Toledo, Ohio, via Kokomo, Indiana, to East St. Louis, Illinois, said line of railroad being subject to said first mortgages above mentioned, namely: that part of the line extending from Toledo, Ohio, to Kokomo, Indiana, being subject to the said first mortgage of the Toledo, Delphos and Burlington Railroad Company executed and delivered January 17, 1880, and that part of the line extending from Kokomo, Indiana, to East St. Louis, Illinois, being subject to the said first mortgage of the original Toledo, Cincinnati and St. Louis Railroad Company, executed and delivered July 23, 1881. The part of the railroad covered by the first mortgage of the Toledo, Delphos and Burlington Railroad Company was known as the "Toledo Division." The part of the railroad covered by the first mortgage of the original Toledo, Cincinnati and St. Louis Railroad Company was known as the "St. Louis Division."

Subsequent to January 17, 1880, and prior to February 25, 1882, the Toledo, Delphos and Burlington Railroad Company became, by various agreements of consolidation, and otherwise, the owner of several other lines of narrow gauge railroad in the State of Ohio. These several lines were known as separate divisions of the Toledo, Delphos and Burlington Railroad and were

each subject to separate mortgages which need not be here described.

In December, 1881, only two months before the consolidation of the Toledo, Delphos and Burlington Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company, which consolidation, as has been stated, occurred February 25, 1882, the Toledo, Delphos and Burlington Railroad Company, then owning some considerable equipment, entered into certain contracts, named leases, but which were in fact contracts of conditional purchase, under which certain rolling stock and equipment was delivered to the Toledo, Delphos and Burlington Railroad Company. After the consolidation of February 25, 1882, the consolidated company, The Toledo, Cincinnati and St. Louis Railroad Company, entered into other like contracts of conditional purchase, under which a large amount of rolling stock and equipment was delivered to the consolidated company by the conditional vendors.

In the early part of 1883 the consolidated company, The Toledo, Cincinnati and St. Louis Railroad Company, entered into a further agreement of consolidation with two other narrow gauge railroad corporations of Ohio known, respectively, as the "Cincinnati Northern Railway Company" and the "Spring Grove, Avondale and Cincinnati Railway Company." Prior to this last consolidation by which The Toledo, Cincinnati and St. Louis Railroad Company became possessed of the Cincinnati Northern Railway Company, that company had entered into a like contract of conditional purchase, under which it obtained possession of certain equipment.

These various contracts of conditional purchase and sale of rolling stock and equipment entered into by

the Toledo, Delphos and Burlington Railroad Company, the Cincinnati Northern Railway Company and The Toledo, Cincinnati and St. Louis Railroad Company, and the possession of rolling stock and equipment delivered to said three corporations under said contracts, constitute the foundation of the claims of these appellees.

In the decision of this Court on the former appeals in this same litigation, these contracts were held to be contracts of conditional purchase and sale. In announcing the decision of this Court, Mr. Justice Brewer used the following language touching this point:

"This rolling stock was obtained by the railroad company, a consolidated corporation, from certain manufacturers, the appellees herein, on contracts of purchase. These in form were leases, but, in substance, and properly so adjudged, were contracts of purchase, reserving title in the vendors until after the payment of certain annual sums, called rents, and with the right to retake possession on default in payment."

(136 U. S., 95, 96.)

3. On January 1, 1883, default was made in the payment of interest due upon the first mortgage bonds secured by the first mortgage of the Toledo, Delphos and Burlington Railroad Company, executed and delivered January 17, 1880, and no interest was ever thereafter paid upon said bonds. On the same day—January 1, 1883—default was also made in the payment of interest on the first mortgage bonds of the Toledo, Cincinnati and St. Louis Railroad Company, secured by the first mortgage of said company executed and delivered July 23, 1881, and no interest was ever thereafter paid upon said first mortgage bonds.

On August 1, 1883, Grenville D. Braman, an

unsecured creditor, filed a creditor's bill against the consolidated company, The Toledo, Cincinnati and St. Louis Railroad Company, in the Circuit Court of the United States for the District of Indiana, and asked for the appointment of a Receiver to take possession of and operate the entire system of railroad then owned and operated by the consolidated company in the States of Indiana, Illinois and Ohio. Under this creditor's bill a Receiver was appointed on August 1, 1883, and the entire system of railroad passed into the possession of said Receiver.

At the time the Receiver was appointed under the creditor's bill, the consolidated company was in default in payments due under the several contracts of conditional purchase of rolling stock and equipment; and by the terms of said conditional contracts the right of these appellees to retake possession of their rolling stock and equipment was perfect and complete. But no demand whatever for possession of, or for rental for the use of, any of this rolling stock and equipment, was made of the Receiver under the creditor's bill by either of these appellees, with the single exception of what may be called the "Grant" claims.

It is clear that equity gives no support whatever to the claims of these appellees on the ground that the use of their rolling stock and equipment, either by the company or by the Receiver, added anything to the mortgaged estate or contributed anything of value to the earnings of the railroad. In the decision of the former appeals Mr. Justice Brewer said: "This case is not embarrassed by any matter of surplus earnings, for it appears beyond any possibility of doubt, that from the time of the purchase of this rolling stock to

the time of the final disposition of these cases, the receipts did not equal the operating expenses. There was no diversion of the current earnings, either to the payment of interest or the permanent improvement of the property." (136 U. S., 96.)

On October 20, 1883, the Central Trust Company of New York, as sole trustee in the first mortgage of the Toledo, Delphos and Burlington Railroad Company upon the line of railroad extending from Toledo, Ohio, to Kokomo, Indiana, filed in the Circuit Court of the United States for the District of Indiana a bill for the foreclosure of the said first mortgage of the Toledo, Delphos and Burlington Railroad Company.

(Record, Cause No. 252, October Term, 1889, p. 25.)

On December 1, 1883, on motion of the solicitors for the Central Trust Company of New York, as sole trustee in the first mortgage of the Toledo, Delphos and Burlington Railroad Company, William J. Craig was appointed Receiver under said foreclosure proceedings, the appointment being made by the Circuit Court of the United States for the District of Indiana.

(Record, Cause No. 252, October Term, 1889, p. 73.)

Upon the appointment of Craig as Receiver under the foreclosure proceedings brought to foreclose the first mortgage of the Toledo, Delphos and Burlington Railroad Company, the receivership under the creditor's bill terminated, having continued exactly four months.

From a statement made by Mr. Justice Brewer in announcing the decision of this Court on the former appeals, and from the statements contained in the first paragraph of each of the mandates issued on the reversal of said former appeals, it appears evident that this Court was under the impression that a suit to fore-

close the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company, covering the line of railroad from Kokomo, Indiana, to East St. Louis, Illinois, was brought at the same time that the suit to foreclose the first mortgage of the Toledo, Delphos and Burlington Railroad Company, covering the line of railroad from Toledo, Ohio, to Kokomo, Indiana, was brought, and that the suits to foreclose the two mortgages covering the entire line from Toledo, Ohio, to East St. Louis, Illinois, were consolidated by order of Court. The statement of Mr. Justice Brewer, to which reference is made, is as follows:

"On the first of December, 1883, however, the situation was changed. At that time the *mortgagees* upon the realty commenced *suits* to foreclose *their mortgages*, and at *their* instance, a Receiver was appointed for all the property, both real and personal. In respect to the question here involved, the case is as though this was the commencement of judicial proceedings."

(136 U. S., 100.)

In each of the mandates issued by this Court upon the reversal of the former decrees, the separate suits for the foreclosure of the first mortgage of the Toledo, Delphos and Burlington Railroad Company and the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company are mentioned as consolidated, the words used in each of said mandates being: "*Nos. 7706, 7814, and 7815, in Chancery, Consolidated.*"

(Record, pp. 1, 5.)

This is a misapprehension of the facts disclosed by the records. *At the time Craig was appointed Receiver under the foreclosure proceedings brought to foreclose the first mortgage of the Toledo, Delphos and Burlington Railroad*

Company, covering the line of railroad from Toledo, Ohio, to Kokomo, Indiana, no suit whatever had been brought to foreclose the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company, covering the line of railroad from Kokomo, Indiana, to East St. Louis, Illinois. No suit to foreclose the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Compony, executed and delivered to the Central Trust Company of New York and Thomas A. Hendricks, as Trustees, on July 23, 1881, was brought until June 16th and 17th, 1884.

On June 16, 1884, Edward F. Leonard, a citizen of the State of Illinois and a holder of bonds secured by said first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company, filed a bill in the Circuit Court of the United States for the District of Indiana, as such bondholder, asking for the foreclosure of the mortgage.

On June 17, 1884, the Central Trust Company of New York, as one of the Trustees in the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company, filed in the Circuit Court of the United States for the District of Indiana a bill to foreclose said first mortgage, making its co-trustee, Thomas A. Hendricks, defendant; the said Thomas A. Hendricks being a citizen of the State of Indiana and having been appointed as co-trustee under and pursuant to a statute of the State of Indiana requiring a resident trustee to be appointed in railroad mortgages covering lines of railroad in the State of Indiana. These two bills were filed for the purpose of securing jurisdiction in the Circuit Court of the United States for the District of Indiana. These two suits for the foreclosure of the first mortgage of

the Toledo, Cincinnati and St. Louis Railroad Company were consolidated.

(Record, Cause No. 252, October Term, 1889, pp. 135, 151, 188.)

No order of consolidation was ever entered consolidating the suit of the Central Trust Company of New York against the Toledo, Delphos and Burlington Railroad Company, et al., for the foreclosure of the first mortgage of the Toledo, Delphos and Burlington Railroad Company with the suit, or suits, for the foreclosure of the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company to the Central Trust Company of New York and Thomas A. Hendricks, Trustees.

No Receiver was ever appointed under the suits brought June 16th and 17th, 1884, for the foreclosure of the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company. No order was ever entered extending the Craig receivership to the foreclosure suits brought to foreclose the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company.

The only way in which Craig became Receiver of the railroad extending from Kokomo, Indiana, to East St. Louis, Illinois, and covered by the first mortgage of the Toledo, Cincinnati and St. Louis Railroad Company to the Central Trust Company of New York and Thomas A. Hendricks, Trustees, was by virtue of his appointment as Receiver under the suit brought by the Central Trust Company, as sole Trustee, for the foreclosure of the first mortgage of the Toledo, Delphos and Burlington Railroad Company, covering the line of railroad extending from Toledo, Ohio, to Kokomo, Indiana.

4. As soon as the leading holders of bonds secured

by the first mortgages on the Toledo and St. Louis Divisions, discovered the antagonistic relation of the trusteeships assumed by the Central Trust Company of New York, they became distrustful of the management of their trustee in the premises, and set about procuring united action of the bondholders in their own behalf. During the progress of the various litigations arising under the several trusteeships of the Central Trust Company of New York regarding this system of railroad, sufficient facts have been disclosed to prove that the bondholders were fully warranted in their distrust regarding the protection of their interests by their said Trustee. A provisional committee representing part of the bondholders was formed late in 1883, and made certain requests which will be hereinafter referred to; but the bondholders being widely scattered, it required considerable time to secure the united action of the bondholders as a body. As soon as united action was obtained, the holders of bonds secured by the first mortgage on the Toledo Division, appointed a committee to represent their interests in the litigation. At the same time the holders of bonds secured by the first mortgage on the St. Louis Division also appointed a committee to take charge of their interests. In October, 1884, and as soon as these committees were in working order, they employed the writer of this brief to take charge of the interests of the bondholders on both the Toledo and St. Louis Divisions.

On November 10, 1884, application was made to admit these committees as co-complainants in the two foreclosure proceedings. This application was resisted by counsel for the Trustee, the Central Trust Company, but on hearing was granted by the Court, provisionally,

leave being granted to the Central Trust Company to move to set aside the order admitting said committees as co-complainants.

(Record, Cause No. 252, October Term, 1889, pp. 268, 283, 286.)

As soon as possible after their admission as co-complainants, these committees, on November 28, 1884, filed their petition showing the Court that the operation of the road by the Receiver was resulting in a net loss of from $500.00 to $1,000.00 per day, and asking the Court to require these appellees to remove their rolling stock and equipment from the road at once. This petition was heard by the Court on December 1, 1884, and upon it the Court entered an order requiring the Receiver to deliver to these appellees, and requiring appellees to take and remove all of their equipment from the railroad, on or before January 1, 1885.

(Record, Cause No. 252, October Term, 1889, pp. 287 to 292 and 301.)

These appellees filed intervening petitions touching the possession and use of their rolling stock and equipment by the Receivers. These petitions were referred to the Master with directions to take testimony and report the same, with his findings thereon.

On November 12, 1885, while the intervening petitions of these appellees were still pending before the Master, foreclosure decrees and orders of sale were entered in the two foreclosure suits covering the line of railroad from Toledo, Ohio, to East St. Louis, Illinois, the decrees on the Toledo Division and the St. Louis Division being separate and several decrees. The amount found due the holders of bonds secured by the first mortgage of the Toledo, Delphos and Burlington

Railroad Company was $1,524,085.00. The minimum bid for the Toledo Division allowed by the decree was $600,000.00. The amount found due the holders of bonds secured by the first mortgage on the St. Louis Division, was $3,569,615.36. The minimum bid allowed by the decree on the St. Louis Division was $900.000.00.

(Record, Cause No. 252, October Term, 1889, pp. 461 to 482.)

On December 30, 1885, the Toledo Division was sold by the Special Masters to Sylvester H. Kneeland for $600,000.00. On the same day the St. Louis Division was by the Special Masters sold to Sylvester H. Kneeland for the sum of $901,000.00.

(Record, Cause No. 252, October Term, 1889, pp. 514, 519.)

On February 5, 1886, these sales to Kneeland were confirmed by the Court. On March 10, 1886, the Masters reported to the Court their deed conveying the entire line of railroad from Toledo, Ohio, to East St. Louis, Illinois, to Sylvester H. Kneeland. The deed was confirmed.

(Record, Cause No. 252, October Term, 1889, pp. 533, 534, 555.)

On April 5, 1886, the Circuit Court rendered final decree in favor of all these appellees excepting only George William Ballou, Trustee. Kneeland appealed from this decree.

(Record, Cause No. 252, October Term, 1889, pp. 570 to 572.)

On November 9, 1889, final decree was rendered in favor of George William Ballou, Trustee, one of these appellees. Kneeland appealed from this decree.

(Record, Cause No. 1537, October Term, 1889, pp. 33-35.)

These two appeals were heard and determined by this Court together, as one single appeal.

5. In all of the intervening petitions of appellees, and in the Master's Report, and in the final decrees appealed from by Kneeland, the receiverships of Dwight and Craig were treated and regarded as one single, continuous receivership extending from August 1, 1883, to January 1, 1885, the last named date being the date on which all of the rolling stock and equipment belonging to appellees was surrendered to them, and taken possession of by them under order of the Court.

No itemized separate claims or demands were made by appellees, or either of them, for the use of said rolling stock and equipment, for any distinct and separate portion of the seventeen months from August 1, 1883, to January 1, 1885.

From the fact that the Ohio Divisions were all sold and passed out of the possession of Receiver Craig on, or prior to, August 1, 1884; and from the further fact that after August 1, 1884, the use of appellees' equipment then in possession of the Receiver was supposed to be confined to the line of railroad extending from Toledo, Ohio, to East St. Louis, Illinois, the Master made a division of his accounts and computations as of August 1, 1884, allotting the total amount found due by him for the twelve months from August 1, 1883, to August 1, 1884, to the *entire system*, including the Ohio Divisions, and distributing said amount among the various divisions in accordance with the distribution provided by the order of the Court: and allotting all of the amount found due by him for the five months from August 1, 1884, to January 1, 1885, to the main line extending from Toledo, Ohio, to East St. Louis, Illinois,

and distributing said amount to the St. Louis Division, the Toledo Division and the Toledo Terminals, in accordance with the scheme of distribution set forth in the order of the Court.

In the decree of April 5, 1886, appealed from, the total amount for the entire seventeen months found due to each of the appellees is given in a single sum, no distribution as to periods of time being made in said final decree. At the close of said decree the aggregate amount found due to all of the appellees included in said decree is divided into three periods, namely, August 1, 1883, to December 1, 1883; December 1, 1883, to August 1, 1884; August 1, 1884, to January 1, 1885. This division was made pursuant to an order of Court entered on motion of appellant Kneeland.

(Record, Cause No. 252, October Term, 1889, pp. 570 to 572, and 536.)

The decree of November 9, 1889, in favor of Ballou, Trustee, appealed from by Kneeland, was similar to the decree of April 5, 1886, as to division into periods of time.

It will be important to bear in mind these facts last above stated in the consideration of one of the chief questions presented by these appeals.

That the Master's computations and findings, and the former decrees of the Circuit Court were all based on a single continuous receivership for the seventeen months from August 1, 1883, to January 1, 1885, and that the allotment and division, of the several total amounts found due to these several appellees for the seventeen months, into two periods of twelve months and five months, respectively, is arbitrary, and made on the percentage basis that five months is five seventeenths

of seventeen months, is conclusively established by the Master's Schedules appearing in the record of these appeals. This is true both as to rentals and repairs.

(Record, pp. 36, 48, 57.)

Take the Master's summary of Schedule "A," covering eight series of Massachusetts Car Trust Equipment, as found on page 36 of the record. The total rentals there given for the seventeen months amount to $207,066.31. This aggregate is then divided into the twelve and five months periods, allotting $146,018.81 to the twelve months period, and $61,047.50 to the five months period. A moment's computation will show the Court that $146,018.81 is twelve-seventeenths, and $61,047.50 is five-seventeenths of the $207,066.31. This proves that the computations of the Master, as carried into the former decrees, are purely arbitrary as to the divisions into periods of time, and are based upon the supposition and assumption that *all* of the rolling stock and equipment was used every month of the seventeen months. The other schedules as to rentals are made up precisely as the one above referred to.

That the same arbitrary distribution and allotment was made and carried into the former decrees as to repairs of cars, is conclusively shown by Schedule "F," on page 48 of the record, and again in the claim of D. B. Paul, Trustee, appearing on page 57 of the record. Schedule "F" on page 48 of the record shows that the repairs were distributed on the percentage basis, twelve-seventeenths being allotted to the period from August 1, 1883, to August 1, 1884, and five-seventeenths being allotted to the period from August 1, 1884, to January 1, 1885, utterly regardless of the actual repairs necessarily occasioned during each period, respectively. The

claim of D. B. Paul, Trustee, as computed on page 57 of the record, proves conclusively that this arbitrary distribution on the percentage basis as to the two periods of time, was applied both to rentals and repairs.

Another strange and startling fact is made apparent by these schedules. It is this: These schedules show that the entire rentals and repairs of *all* of the rolling stock and equipment of all of these appellees, was charged against the single line of railroad from Toledo, Ohio, to East St. Louis, Illinois, from August 1, 1884, to January 1, 1885, utterly regardless of the fact that the main line from Toledo, to East St. Louis could not and did not use anything like all of this rolling stock and equipment during that five months. The charge of all the rental against the main line for this five months seems to have been made simply from the fact that the Ohio Divisions had been sold under foreclosure sales on or before August 1, 1884; and regardless of the fact as to whether the Ohio Divisions still retained part of this rolling stock and equipment after their sale or not. The evidence introduced before the Master showed that a considerable portion of this rolling stock and equipment remained in the use and possession of the Ohio Divisions after they were sold, and after August 1, 1884. Yet, under this arbitrary apportionment, the main line is charged with all the rental of all of this rolling stock for that five months, whether it used said rolling stock and equipment or not.

The length of the main line of railroad from Toledo, Ohio, to East St. Louis, Illinois, is 449 7-10 miles. The mileage of the *entire system*, before the Ohio Divisions were sold, was 783 5-10 miles.

(Record, Cause No. 1537, October Term, 1889, p. 179.)

The rolling stock and equipment owned by these appellees, taken in connection with the rolling stock and equipment owned by the several divisions of the railroad, constituted an ample and abundant equipment for the *entire system* of 783 5-10 miles of railroad; in fact was far more equipment than could be used to advantage by the entire system, as is conclusively established by the fact that the Receiver, while operating the entire system, made a heavy daily loss, the entire earnings not equaling the operating expenses. Can it be possible that a Court of equity can hold these unfortunate main line bondholders liable for the rental and repairs of *all* of the rolling stock and equipment of these appellees for the five months from August 1, 1884, to January 1, 1885, when prior to August 1, 1884, the main line had had a superabundant equipment, while using only about one-half of the rolling stock and equipment belonging to these appellees? Can it be possible that the main line from Toledo, Ohio, to East St. Louis, Illinois, *needed* all of this rolling stock and equipment during that five months? The evidence shows that when Receiver Craig was required by order of Court to surrender the rolling stock to these appellees on the first of January, 1885, and to have it inspected prior to such surrender, he could not and did not inspect it all, for the simple reason that a considerable portion of it was then in use on the Ohio Divisions, that had been sold and separated from the system prior to August 1, 1884. Yet, under the average and percentage system upon which the former decrees were based, the bondholders, as represented by Kneeland, are obliged to pay rental for equipment not only that was not needed on their line, but that was not in fact used on their line.

These statements will become important in consideration of the basis adopted by the Circuit Court for the formation of the new decrees here appealed from.

6. *The decrees of April 5, 1886, and November 9, 1889, were reversed by this Court.* Ordinarily, it would be unnecessary to emphasize such a statement, but in view of the course pursued in the rendition of the decrees here appealed from, it seems necessary to emphasize and establish beyond controversy the fact that *the former decrees were reversed.*

In concluding the decision of this Court on the former appeals, Mr. Justice Brewer said: "Our conclusion, therefore, in the two cases is, that the decrees must be *reversed*, and the cases remanded with instructions to strike out all allowances for rental prior to December 1, 1883, at the time when the Receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent thereto.

"Counsel for the Grant claims expressly stated, in open Court, in his argument, that in case certain appeals from the Sixth Circuit were affirmed, there might result a double allowance to his clients, which they did not insist upon. As the details and sum are not clearly presented, we can only say that this matter must be taken into account in the subsequent disposition of the cases."

(136 U. S., 103, 104.)

The mandate issued by this Court upon the decision of the appeal from the decree of April 5, 1886, contains the following:

"It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this case be, and the same is hereby, *reversed with costs*, and that the said Sylvester H. Kneeland recover against

the said intervenors, the American Loan and Trust Company, *et al.*, two thousand one hundred and seventy-two dollars for his costs herein expended, and have execution therefor."

The mandate issued by this Court upon the decision of the appeal from the decree of November 9, 1889, contains the following:

"It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this case be, and the same is hereby, *reversed with costs*, and that the said Sylvester H. Kneeland recover against the said intervenor, George William Ballou, Trustee, seven hundred and thirty four dollars for his costs herein expended, and have execution therefor."

(Record, pp. 4, 8.)

In view of the above quotations from the decision of this Court as announced by Mr. Justice Brewer, and from the mandates issued by this Court pursuant to said decision, it certainly may be safely affirmed that the former decrees were, by this Court, WHOLLY REVERSED.

The contingency mentioned by Mr. Justice Brewer in the closing paragraph of the opinion, as above quoted, occurred on April 21, 1890, by the decision of this Court as announced in *Trust Co.* v. *Grant Locomotive Works*, 135 U. S., 207.

7. On June 21, 1890, after said mandates had been duly filed in the Circuit Court, appellant Kneeland filed a written motion for a reference to the Master. In this motion appellant Kneeland set forth the facts with regard to the method and basis of computations, averages and percentages, upon which the former decrees were based, as to the division and allotment of

amounts to the different periods named in said decrees, and showing that no new decrees containing the actual facts and amounts could be properly framed without such reference to the Master. He also set forth in said motion the fact that no consolidation of the suits to foreclose the separate mortgages of the Toledo Division and the St. Louis Division ever took place, and the further fact that no Receiver was ever appointed under the suit to foreclose the mortgage on the St. Louis Division; and that no order was ever entered extending the existing receivership to that foreclosure proceeding. In his motion, appellant Kneeland also called the attention of the Court to the fact of the contingency with reference to the "Grant" claims, as mentioned in the decision of this Court, having occurred, and that said contingency would require an entire recomputation, adjudication and distribution of the claims known as the "Grant" claims. This motion appears in full in the record. (Record, pp. 9 to 12.)

The Court overruled this motion of appellant Kneeland, and indorsed on said motion the reasons of the Court for overruling the same. By inadvertence, the Clerk in making up the record in these appeals, omitted this written statement of the Court, but has supplied that omission by delivering to me the following certified copy, which I herewith print as part of this brief.

"IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF INDIANA.

THE CENTRAL TRUST COMPANY OF NEW YORK, ET AL., *vs.* THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY, ET AL.	*No. 7706, Chancery.*
EDWARD F. LEONARD, ET AL., *vs.* THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, ET AL., AND THE CENTRAL TRUST COMPANY OF NEW YORK, ET AL., *vs.* THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, ET AL.	*Nos. 7814 and 7815, Chancery. Consolidated Causes.*

The Court considering that the reports of the Master and schedules on file in the case furnish sufficient and proper data to enable the Court to comply with the Mandate of the Supreme Court, doth overrule this motion, to which ruling S. H. Kneeland excepts.

6-21-90. W. A. W.

UNITED STATES OF AMERICA, DISTRICT OF INDIANA. } ss:

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby

certify that the above and foregoing is a full, true and complete copy of the endorsement of the Court, Honorable William A. Woods, Judge of said Court presiding, endorsed on the Motion for reference to Master, which motion was filed in said Court in the above entitled causes on the 21st day of June, 1890, as fully as said endorsement remains on file in my office.

Witness my hand and the seal of said Court, at Indianapolis in said District, this 13th day of January, A. D. 1891.

(SEAL.)

NOBLE C. BUTLER, *Clerk.*"

The report of the Master, and the schedules referred to by the Court, are all now before this Court. The final report of the Master, filed February 23, 1886, and a single schedule accompanying that report, were before this Court on the former appeals.

(Record, Cause No. 252, October Term, 1889, pp. 538 to 552.)

All the other schedules of the Master are made part of the record in these appeals. (Record, pp. 34 to 103.)

It is respectfully submitted that neither the Circuit Court nor the counsel for appellees, could take this Master's Report and these schedules, with their wilderness of bewildering figures, and from them frame decrees in accordance with the explicit directions of the mandates of this Court, without the aid of a Master, and without reference to the evidence introduced before the Master from which evidence these schedules were compiled.

The fact is, that these decrees here appealed from, are not framed in accordance with, and based upon, *actual facts*, as to rentals and repairs of the rolling stock and equipment belonging to these appellees for the

period prescribed by the decision and mandates of this court, to-wit: December 1, 1883, to January 1, 1885, but are simply, as to rentals and repairs, the result of averages and percentages arrived at by deducting, from the amount originally decreed due to each of these appellees, *four-seventeenths*. This deduction has been made by subtracting from the amounts charged against the Toledo Division and the St. Louis Division for the twelve months from August 1, 1883, to August 1, 1884, as shown on the Master's Schedule "S" filed with his final report, *one-third part of said amounts*, on the assumption that subtracting one-third of the amounts charged against the St. Louis Division and the Toledo Division for that twelve months, is a compliance with the mandates and direction of this Court to strike out all allowances prior to December 1, 1883. It therefore results that these decrees as to rental and repairs are not based upon the actual facts as to what equipment was used during the Dwight receivership, and as to what repairs were actually made during that receivership, but are simply the result of subtracting four-seventeenths from the total amount found due each of these appellees from the Toledo Division and the St. Louis Division, on the assumption that the use and repairs of all of this rolling stock and equipment were precisely the same and of the same value each month of the seventeen months from August 1, 1883, to January 1, 1885.

The decree entered June 21, 1890, in favor of the appellees represented by Mr. James L. High, is based entirely upon the system of percentage and proportion above described. This decree appears in the record.

(Record, pp. 12 to 19.)

(Note: In printing the record, the claims of Pen-

nock Brothers, the Erie Iron Company and S. M. Carpenter, have become badly mixed up. Just above Folio 25 on page 15 of the record, immediately under the words "for eight months' period," the whole of Folio 26, appearing on page 16, should be inserted.)

On June 21, 1890, Mr. Henry D. Hyde, as Solicitor for the American Loan and Trust Company and E. B. Phillips, Trustee, declined to accept a decree in behalf of his clients based upon the percentages and proportions upon which the decree in behalf of the clients represented by Mr. High is based. Mr. Hyde was under the impression that the *actual facts* as to cars and equipment lost and destroyed during the separate periods, would be better for his clients than a decree based upon the proportions and percentages adopted by Mr. High in framing the decree in behalf of his clients. As the result of this difference of opinion, these two decrees are not framed on the same basis as to cars lost or destroyed. Mr. Hyde, some time after June 21, 1890, came to Indianapolis for the purpose of procuring a decree in behalf of his clients.

On September 27, 1890, appellees, the American Loan and Trust Company and E. B. Phillips, Trustee, being present in Court by Mr. Henry D. Hyde, their solicitor, appellant Kneeland filed written motion to refer the claims of said appellees to the Master. This motion contained, in substance, the same averments set forth in the motion filed by Kneeland on June 21, 1890, hereinabove referred to, and in addition to said averments stated that the American Loan and Trust Company and E. B. Phillips, Trustee, were, by their counsel, demanding and insisting upon other and different methods of computation from those used in framing the decree of June 21, 1890.

This motion is accompanied by the affidavit of appellant Kneeland, in which he sets forth the fact that in 1883 a bondholders' committee, representing a large majority of the bonds secured by the first mortgages on the Toledo Division and the St. Louis Division, requested the Central Trust Company, as Trustee in said mortgages, to procure an order of Court requiring these appellees to remove their cars and equipment from the railroad covered by said mortgages; and that said committee also requested the owners of said cars and equipment, through their attorneys, to have said cars and equipment removed from said Toledo Division and St. Louis Division at once. This motion and affidavit appear in full in the record. (Record, pp. 19 to 25.)

The Court overruled said motion and indicated the kind of a decree that would be approved by the Court, but no decree was then entered. At the close of that hearing, Mr. Hyde returned to Boston, taking with him some of the file papers in these causes. The computations of amounts in this decree in favor of the American Loan and Trust Company and E. B. Phillips, Trustee, were made, and the decree as entered was drafted, by Mr. Hyde, in Boston, and the decree so drafted was sent, together with the file papers, from Boston to the Clerk of the Circuit Court of the United States for the District of Indiana on October 7, 1890, but was entered as of September 27, 1890.

As I understand it, this decree, as to rentals and repairs, is made up on the same basis of averages and percentages used by Mr. High in drafting the decree of June 21, 1890; but that as to lost and destroyed cars, the basis of averages and percentages has not been followed. Hence it results that these two decrees, involv-

ing precisely the same points and rights, are not drafted on the same basis of computations.

To illustrate the difference. Take the claim of the American Loan and Trust Company for what is termed the "eight months' period," as it appears in the decree of September 27, 1890. (Record, p. 29.)

The amounts there allowed in the decree are:

"From Toledo Division for Eight Months' Period.....$11,914.32
"From St. Louis Division for Eight Months' Period..... 11,348.40"

Making a total of.....$23,262.72

On the method of computation upon which the decree of June 21, 1890, in favor of Mr. High's clients is based, these amounts would have been as follows:

"From Toledo Division for Eight Months' Period.....$11,518.66
"From St. Louis Division for Eight Months' Period..... 10,971.54"

Making a total of.....$22,490.20

Thus making a difference in these two items of $757.52 against appellant Kneeland.

Can it be possible that both of these decrees are correct in the basis on which their computations were made, when such diverse results are reached?

It is quite evident that neither of them is in obedience to the Mandates of this Court. Counsel for appellees cannot claim that all allowances made to these appellees in the former decrees for the period from August 1, 1883, to December 1, 1883, have been stricken out, except upon a bald assumption that *all* of the

equipment used during the four months from August 1, 1883, to December 1, 1883, was also used from December 1, 1883, to January 1, 1885; and that the cost of repairs during the four months of the Dwight receivership was precisely the same per month that it was during the thirteen months of the Craig receivership.

In the decree of June 21, 1890, the further assumption is made that the same average value of cars was lost and destroyed during each month of the seventeen months from April 1, 1883, to January 1, 1885. Not knowing, personally, the basis upon which the amounts in the decree of September 27, 1890, were computed, I cannot state definitely what assumptions were indulged in in drafting that decree.

At the instance of counsel for appellees, the Circuit Court *allowed over four years' interest on a large portion of the amount decreed due to each of these appellees, dating the allowance of interest from the date of the entering of the reversed decrees, namely, April 5, 1886.*

These two decrees contain $13,943.01 of interest assessed against appellant Kneeland and in favor of these appellees, whose former decrees were wholly reversed by this Court.

No legal right to assess this interest was claimed. No authorities were produced or cited authorizing the Court to assess interest upon the amounts, or any part thereof, set forth in the *reversed decrees.* The claim asserted, and adopted by the Court, was that the Court, sitting in Chancery, had arbitrary right and power, in its discretion, to allow or refuse interest on the whole, or any part, of the amount decreed due to these appellees by the *reversed decrees*, excepting only the amounts allowed to them for the possession and use of their

equipment by Receiver Dwight during the four months from August 1, 1883, to December 1, 1883.

Kneeland prosecutes these appeals from these decrees of June 21, 1890, and September 27, 1890.

ASSIGNMENT OF ERRORS.

1. *The Circuit Court erred in allowing interest to appellees, from the date of the reversed decrees, upon any portion of the amounts decreed due to appellees by said reversed decrees.*

2. *The Circuit Court erred in overruling appellant Kneeland's motions of June 21, 1890, and September 27, 1890, for reference of these causes to the Master; and in refusing to permit appellant Kneeland to prove the facts set forth in said motions, and in his affidavit filed in connection with his motion of September 27, 1890.*

3. *These decrees of June 21, 1890, and September 27, 1890, are not in obedience to, or compliance with, the decision and mandates of this Court.*

ARGUMENT.

I.

THE CIRCUIT COURT ERRED IN ALLOWING INTEREST TO APPELLEES, FROM THE DATE OF THE REVERSED DECREES, UPON A LARGE PORTION OF THE AMOUNT DECREED DUE TO EACH OF THESE APPELLEES BY SAID REVERSED DECREES.

It has already been shown by quotations from the decision of this Court, announced by Mr. Justice Brewer, and from the mandates issued by this Court, that the decrees of April 5, 1886, and November 9, 1889, were *wholly reversed* by this Court.

A reversed decree is no decree. It is blotted out. When the former decrees were *reversed*, the amounts de-

creed due to these several appellees by the reversed decrees became, again, *wholly unliquidated claims.* When the mandates of this Court were filed in the Circuit Court, the claim of each of these appellees became an *unsettled, unascertained, unliquidated claim*, subject to recomputation, and liquidation, *as a single entire claim*, in exact obedience to the mandate of this Court, *and not otherwise.*

When the Circuit Court had ascertained to its satisfaction the exact amount due to D. B. Paul, Trustee —one of these appellees—upon his claim, that Court had no right, either at law or in equity, *to add $3,689.11 to the amount so found due as interest on a part of the single amount decreed due to D. B. Paul, Trustee, by the reversed decree of April 5, 1886.* Yet that is exactly what the Circuit Court did in this case. The same was done regarding the claim of each of these appellees; the interest thus wrongfully assessed amounting, in the aggregate, to $13,943.01.

It may be impossible to cite authorities directly proving that such action was wrongful and without sanction by either law or equity from the simple fact that very rarely, if ever, has such action been taken by any Court. I have thus far been unable to find a single adjudicated case in which a Court has assessed against a *successful appellant* a large amount of interest on the amount, or part thereof, decreed due in a decree he has succeeded in reversing.

The rules of this Court touching the subject of interest, and decisions rendered by this Court, furnish, by analogy, strong authority against the ruling of the Circuit Court now under consideration.

At common law, judgments and decrees did not

carry interest. Damages were sometimes assessed and recovered *for the detention of the debt.* By Section 8 of the Act of Congress, approved August 23, 1842, U. S. Stats. at Large, Vol. 5, p. 518, interest on *judgments* of the Circuit and District Courts of the United States was first allowed. This Act did not apply to decrees in equity in the Circuit and District Courts, nor did it apply to either judgments or decrees of this Court.

In *Perkins* v. *Fourniquet*, 14 How. (U. S.) 328,—which seems to be the leading case on the subject of interest in the Federal Courts—it is said: "Upon common law principles a judgment does not carry interest. It is true, that damages may be recovered for the detention of the debt, in an action on the judgment. But previous to the Act of 1842, neither interest nor damages, for the detention of the debt, could have been levied under process of execution, upon the judgment of a Circuit or District Court of the United States.

"But the Act of 1842 does not speak of interest or damages upon the judgments of this Court, nor does it repeal the 23d Section of the Act of 1789. This Section provides, that when a judgment or decree *is affirmed here*, this Court is directed to adjudge or decree to the respondent in error, just damages for his delay, and single or double costs, at their discretion. Under this law, there is no distinction made between cases in equity and at law. In either of them, the damages to be allowed, in addition to the amount found to be due by the judgment or decree of the Court below, is confided to the judicial discretion of this Court. * * * But this is a decree in equity, and not embraced in the Act of 1842, and according to the settled chancery practice, no interest or damages could have been levied under

process of execution upon the amount ascertained to be due, and decreed to be paid, *if there had been no appeal.* Nor could any damages or interest have been given on its *affirmance* here, but for the discretionary power vested in this Court by the Act of 1789. That discretion, as we have already said, extends to decrees in equity as well as judgments at law. And the rules have always been applied to both, unless otherwise specially ordered."

The Act of 1842 is still in force, as the law governing the question of interest in the Circuit and District Courts of the United States.

(U. S. Rev. Stats. 1878, Sec. 966.)

If there is any United States Statute in force, vesting in the Circuit and District Courts of the United States an arbitrary discretion to allow or withhold interest, it has escaped my observation. So far as judgments at law are concerned, there is certainly no discretion left in the Circuit and District Courts. It is quite immaterial to here consider or decide whether the Circuit Courts of the United States now have, or have not, power and authority by law to enter decrees in Chancery directing and decreeing that such decrees shall bear interest from their date until paid. If the decision in *Perkins* v. *Fourniquet, supra,* is still a correct interpretation of the law, it is evident that no interest could have been collected on these reversed decrees by execution or other process, even if no appeals from them had been taken.

The exact question here to be decided is: Had the Circuit Court any power, either at law or in equity, to add interest *from the date of the reversed decrees,* and make this added interest a part of the new decrees? If it

had, from what law did it acquire such power? Such a discretionary power would far exceed any discretion vested by law in this Supreme Court.

By the Twenty-third Section of the Judiciary Act of 1789, it was provided as follows: "Where upon such writ of error the Supreme or a Circuit Court *shall affirm a judgment or decree*, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion."

(U. S. Stats. at Large, Vol. 1, p. 85.)

Under this Act, the Circuit Courts were appellate Courts as to certain judgments and decrees of the District Courts. It will be observed that the discretion given by this Act was, and is, *limited to the affirmance of judgments and decrees.* No power was given to award damages for delay *when the decree appealed from was reversed.*

The various rules of this Court touching damages for delay, and interest by way of damages for delay, have all been based upon the discretionary power conferred by the Judiciary Act of 1789. This same provision, in substance, is still the law:

"Where, upon a writ of error, judgment is *affirmed* in the Supreme Court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion.

"Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."

(U. S. Rev. Stats. 1878, Secs. 1010, 1012.)

Under this discretionary power so granted, the

Twenty-third Rule of this Court was promulgated. The first and third clauses of that rule are as follows:

"1. In cases where a writ of error is prosecuted to this Court, and the judgment of the inferior Court *is affirmed*, the interest shall be calculated and levied, *from the date of the judgment below until the same is paid*, at the same rate that similar judgments bear interest in the Courts of the State where such judgment is rendered.

"3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this Court."

(Rules of Supreme Court, 108 U. S., 586.)

The decision of this Court in *Railroad Company* v. *Turrill*, 101 U. S., 836, is an instance of the application of the third clause of the Twenty-third Rule above quoted. Many other instances might be cited, but they are all in cases in which the decrees were *affirmed* here. No case will, I think, be found in which interest has been allowed, upon the amount—or part thereof—found due in making up a new decree after *reversal*.

It has already been shown, from the decision of the former appeals, and the mandates issued under said decision, that the former decrees were *wholly reversed*. If further proof were needed on this point, it would be furnished by the third and sixth clauses of the Twenty-fourth Rule of this Court, which are as follows:

"3. In cases of *reversal* of any judgment or decree in this Court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the Court. The cost of the transcript of the record from the Court below shall be a part of such costs, and be taxable in that Court as costs in the case.

"6. When costs are allowed in this Court, it shall

be the duty of the Clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the Court below, and annex to the same the bill of items taxed in detail."

(Rules of Supreme Court, 108 U. S., 587.)

By an examination of the mandates issued on the decision of the former appeals, it will be found that these two clauses of the Twenty-fourth Rule of this Court were complied with. (Record, p. 4, 8.)

Upon the well established principle that statutes granting powers by express and explicit definition and limitation, must be held to *exclude* powers not granted, these statutes above cited, and the rules and decisions of this Court under them, would seem to furnish strong authority in support of the proposition that the Circuit Court had no power, either at law or in equity, to assess against Kneeland,—*a successful appellant*,—interest *from the date of the reversed decrees*,—a period of over four years—upon a large portion of the amount found due to each of these appellees by the new decrees of June 21, 1890, and September 27, 1890. When these statutes, rules and decisions hereinabove cited were submitted to the Circuit Court in resistance of this allowance of interest, they were summarily dismissed from consideration on the ground, as expressed by the Court, that they had no relevancy or application to these cases touching the question of allowance of interest.

The theory advanced by counsel for appellees, and adopted by the Circuit Court, was that this Court did not intend to do what it certainly did do, namely, *wholly reverse the former decrees;* but that the intention of this Court was to partly reverse, and partly affirm, the former decrees. Basing themselves on this theory, counsel

for appellees claimed,—and the Circuit Court approved their claim,—that whatever portion of the claims allowed by the reversed decrees could be computed as belonging to the period from August 1, 1884, to January 1, 1885, remained unaffected by the reversal, and that, therefore, interest on that portion of the several claims should be allowed *from the date of the rendition of the former decrees*, on the ground that this Court had *affirmed* the reversed decrees as to this portion of the claims of appellees.

That this is the theory on which this $13,943.01 of interest is assessed against appellant Kneeland on the reversed decrees, is conclusively established by the following language found in each of the new decrees here appealed from:

"And that no reduction having been made by said mandates in the allowances heretofore fixed by the decrees for the period of five months from August first, 1884, to January first, 1885, the Court doth find that said several intervening petitioners and claimants are entitled to interest on their respective allowances for said period of five months, at the rate of six per cent. per annum from the dates of said decrees respectively so fixing the amounts due to said several claimants." (Record, pp. 13, 28.)

A moment's consideration will prove that this theory is utterly untenable, and without foundation in fact, law or equity, for several reasons.

First. It is not true that the reversed decrees fixed the allowances due these several appellees "*for the period of five months from August first, 1884, to January first, 1885.*" The reversed decrees are copied in full in the mandates, and fully verify this statement. The decree in favor of each of these several appellees, is for a *single*

sum of money covering the rent of, and repairs to, the equipment belonging to each appellee, *for the entire period of seventeen months from August 1, 1883, to January 1, 1885.*

No separate fixed sum is decreed due to each appellee "for the period of five months from August first, 1884, to January first, 1885."

For example: Take the decree in favor of American Loan and Trust Company, as found in the reversed decree of April 5, 1886. It is as follows: "To the American Loan and Trust Company, for rentals, repairs, and for cars destroyed under Series F, G, H, I, K, L and M of the Boston Car Trust, and under Series D of the Massachusetts Car Trust, the sum of $51,-174.96." (Record, p. 2.)

It cannot be claimed, with any show of reason, that this decree fixes or determines any specified sum or allowance in favor of the American Loan and Trust Company "for the period of five months from August first, 1884, to January first, 1885." *It is a single decree, decreeing a single, undivided amount for the entire seventeen months.* Mr. Kneeland was obliged to appeal from this decree in favor of the American Loan and Trust Company *as an entirety* or not at all. He did appeal from it, and this Court *reversed* it.

What justice, equity or law is there to support the Circuit Court in now saying to Mr. Kneeland,—as is in effect said by the new decree,—"It is true the former decree in favor of the American Loan and Trust Company was erroneous and inequitable; it is true the decree called for the payment of a single sum of money which was many thousands of dollars more than you ought to have been required to pay; it is true you had

no opportunity, even if you had desired, to appeal from *a part* only of this decree in favor of the American Loan and Trust Company; it is true that in order to obtain your just rights you were obliged to, and did, at large expenditure by you for costs and counsel fees, appeal from this wrongful decree, and, upon your appeal, the Supreme Court *reversed* it, but the Supreme Court says you do owe the American Loan and Trust Company for the use of its equipment from December 1, 1883, to January 1, 1885; this Court will, therefore, *suppose* the decree against you, which you have caused to be reversed, to have been divided into *two separate, distinct amounts;* one for the period of twelve months from August 1, 1883, to August 1, 1884,—which period covers the error against you as determined by the Supreme Court,—and the other for the period of five months from August 1, 1884 to January 1, 1885; and in the new decree against you in favor of the American Loan and Trust Company, this Court will assess against you the sum of $4,359.92, as interest from the date of the reversed decree—April 5, 1886—up to the date of this new decree, upon the *supposed amount* which would have been decreed against you, in the reversed decree, for the five months from August 1, 1884 to January 1, 1885, *if* the reversed decree had been divided—as to amount—into two separate sums proportioned to the *supposed* periods of twelve and five months?" Can it be possible that equity will permit this? Yet just this and nothing less, is what is deliberately done by the new decrees here appealed from.

The decree in favor of the American Loan and Trust Company has been used as an example. The decrees in favor of the other appellees, in the reversed decree of

April 5, 1886, are all precisely like the one above used as an illustration, excepting only as to amount.

As has already been shown, the awarding of damages, and the awarding of interest by way of damages, upon *affirmance* of appeals by this Court, is in the nature of punishment for unjust delay in payment and detention of money that ought to have been paid without appeal. But in these appeals the rule seems to have been reversed, and punishment, to the extent of $13,943.01, is inflicted upon appellant Kneeland and the unfortunate bondholders represented by him, for appealing from an unjust decree and procuring it to be *reversed.*

Second. The intervening petitions of each of these appellees presents a *single claim* covering the *entire seventeen months.* No separate claim is made for any separate portion, or period, of the seventeen months. Hence it followed, naturally, in fact, inevitably, that the decree in favor of each appellee was for a single, undivided amount, wholly undistributed as to periods of time carved out of the entire seventeen months covered by the intervening petitions. The division of these new decrees into periods of eight and five months is made simply for the purpose of giving some color to the theory, above discussed, upon which the Circuit Court assessed against a *successful appellant* the $13,943.01 of interest found in the decrees here appealed from.

But even if the intervening petitions had contained separate itemized claims, for separate periods of the seventeen months, and the Court had upon the several separate items rendered a single decree for a single aggregate sum, the result would have been the same. Suppose A. files against B. a bill in equity containing seven separate claims or items of account, and the Court

renders a decree for a single amount as the aggregate amount due from B. to A. on the whole case. B. appeals. This Court reverses the decree, directing that whatever part of the single amount named in the reversed decree was allowed by reason of two particular items of account claimed in the bill, should be stricken out. Will equity permit B.,—when the amount that should be stricken out is ascertained,—to be punished for appealing from an unjust decree, by compelling him to pay interest on the corrected amount from the date of the reversed decree which he was obliged to appeal from to procure justice? This question bears its answer on its face. Equity cannot sanction such a wrong.

Third. If it is claimed that,—notwithstanding the fact that the decrees in favor of each appellee were for single amounts, and Kneeland was obliged to appeal from the entire decree or not at all,—the Master's report and schedules furnish data from which the single amounts in the reversed decrees can be separated into three items and allotted to three separate periods of time, namely: August 1, 1883, to December 1, 1883; December 1, 1883, to August 1, 1884; and August 1, 1884, to January 1, 1885, my answer is: *First*, That the Master's report and schedules cannot change the fact that the reversed decrees were for single undivided amounts decreed in favor of these appellees, and that Kneeland was obliged to appeal from the decrees *as entireties*, or not at all, and; *Second*, It has already been demonstrated in the statement of facts in this brief, that the divisions into periods of time, and the allotment of separate amounts to the separate periods, as found in the Master's report and schedules, are purely arbitrary, and do not claim to be based upon actual facts. They are

simply percentages and proportions based on the one period of seventeen months. The divisions, as to amounts, are based on the mathematical fact that twelve months is twelve-seventeenths of seventeen months, and five months is five-seventeenths of seventeen months; and on the *assumption* that each of these months was precisely the same as to the use of, and repairs to, the equipment of these several appellees. The evidence certainly shows that there was a difference in different months; otherwise it would not have happened that Mr. Hyde, as counsel for the American Loan and Trust Company and E. B. Phillips, Trustee, was utterly unwilling to adopt the average basis in drafting his decree. The fact that the divisions found in the Master's report and schedules are mere averages, percentages and approximations, is emphasized by the fact that these two decrees, involving precisely the same principles and rights, are not drafted upon the same method of computation.

In the Court below, some stress was placed upon the words "as fixed" appearing in the instructions of this Court at the conclusion of the decision of Mr. Justice Brewer, and also appearing at the close of each of the mandates. The clause in which these words appear is as follows: "and to allow the rental *as fixed* for the time subsequent thereto."

(136 U. S., 103, Record, pp. 4, 8.)

If it is claimed that the words "as fixed" refer to particular figures, amounts and allotments of separate amounts to particular periods of time carved out of the one period of thirteen months from December 1, 1883, to January 1, 1885, my answer is, that it cannot be possible that this Court so intended, because the reversed decrees, as has been shown, contain no such separate

amounts or allotments of amounts to separate periods. Neither did this Court intend, by using the words "as fixed," to direct the Circuit Court to be bound by and follow the arbitrary division of amounts and periods found in the Master's report and schedule "S" accompanying said report. Such intention was impossible from the fact that the Master never, in any report or schedule, made any attempt to separate the Dwight receivership of four months,—from August 1, 1883 to December 1, 1883,—from the entire period of seventeen months, while the decision and mandates of this Court required just that severance to be made.

This Court certainly did not intend to direct the Circuit Court to simply subtract *four-seventeenths* from the several amounts decreed due appellees in the reversed decrees, and enter new decrees for just thirteen-seventeenths of the amount found due in the reversed decrees. If such had been the intention it would have been so stated. If these words do refer to particular sets of figures and amounts found either in the reversed decrees or in the Master's report and schedules, and if it was intended to bind the Circuit Court by any such sets of figures and amounts, it is very evident that the Circuit Court could not, without violating the mandates, add one cent of interest in the new decrees.

It is perfectly evident that these words "as fixed" have no reference whatever to amounts, but refer solely to the *basis of computing rental, repairs and for destroyed equipment*, upon which the reversed decrees were based. Appellant Kneeland had contended upon the former appeals, that rent should have been charged and computed—if at all—on the *mileage basis*, instead of a fixed rent per month for each piece of equipment. This

Court simply intended to direct the Court below to adhere to the same basis of computation upon which the reversed decrees were computed, in computing the amounts to be inserted in the new decrees.

This interpretation of the words "as fixed" is made abundantly clear and certain by the last paragraph of the decision of Mr. Justice Brewer, in which reference is made to the "Grant" claims. The concluding sentence of this paragraph is: "As the details and sum are not clearly presented, we can only say that this matter must be taken into account in the subsequent disposition of the cases." (136 U. S., 104.)

The decision of this Court in *Illinois Central R. R. Co.* v. *Turrill*, 110 U. S., 301, 304, seems to me to strongly support my contention that the Circuit Court erred in adding to these new decrees interest from the date of the reversed decrees—April 5, 1886. In that case, the original decrees upholding the Cawood Patent were rendered by the Circuit Court in July, 1874. The railroad companies appealed to this Court. In the latter part of 1876 this Court *affirmed* the decrees against three of the railroad companies. As to the Illinois Central R. R. Co., the decision clearly showed that this Court *affirmed* the decree of the Circuit Court, excepting only that that decree included damages for the use of certain machines for repairing rails, which machines this Court held were not infringements on the Cawood Patent. The decree as to such damages was reversed. On reversal the Circuit Court referred the case to the Master to ascertain the damages which should have been included in the former decree. The Master reported in 1879. Some months elapsed after the report was filed before the Circuit Court rendered the new de-

cree. When the new decree was rendered the Court included interest *from the date of the Master's Report in 1879*—NOT FROM JULY, 1874, THE DATE OF THE FORMER DECREE. The Illinois Central R. R. Co. appealed from the new decree, assigning this allowance of interest as error. In deciding this second appeal this Court said: "Here, as has been seen, in effect, the original decrees rendered in July, 1874, were *affirmed* in 1876, to the extent of the present recoveries. The cases were only sent back to ascertain how much should be deducted from those decrees for errors in the accounts as then stated. If the decrees had been entered originally for the present amounts, the patentee would have been entitled to interest from 1874. That was settled in *Railroad Company* v. *Turrill*, 101 U. S., 836, which was one of the cases *affirmed in whole* at the former hearing in this court. Under these circumstances, it seems to us not inequitable to allow interest on the corrected amounts *from the date of the Master's report in 1879*. The cases are entirely different in this particular from what they would have been if the original decrees had been *reversed for error in the principles of the accounting*. Those decrees may very properly be considered as affirmed in part and reversed in part, the new reference being had only to find out the exact extent of the reversals."

If the Circuit Court had added interest *from the date af the original decree*, July, 1874, would this Court have affirmed the new decree? Most evidently it would not. Just that is what the Circuit Court did do in rendering the new decrees in these appeals.

Again. It has already been shown that the original decrees in these cases at bar were *wholly reversed*. The error here was "in the principles of the account-

ing," in this, namely: The entire computations and frame-work of these reversed decrees were based upon the theory of *one continuous receivership for the ssventeen months*, instead of two separate and distinct receiverships —one for the period from August 1, 1883 to December 1, 1883, and the other for the period from December 1, 1883, to January 1, 1885. This error extended to and permeated every computation and every deduction upon which the the reversed decrees were based, because the divisions of amounts and allotments of separate amounts to separate periods were merely arbitrary percentages and proportions of the one continuous receivership for seventeen months.

Under the well established facts of these cases, it certainly cannot be claimed that any equity exists in favor of these appellees, requiring the Circuit Court to punish Kneeland and the bondholders represented by him, to the extent of $13,943.01, for appealing from and procuring the reversal of the original decrees in these cases. By the money paid to these appellees before the failure of the company; and by the return of their equipment to them, they have already received on their investment two or three hundred per cent. more on each dollar than these main line bondholders can by any possibility ever receive.

Appellant Kneeland asks this court to reverse these new decrees for error in assessing against him this large amount of interest added into the decrees here appealed from.

II.

THE CIRCUIT COURT ERRED IN OVERRULING APPELLANT KNEELAND'S MOTIONS OF JUNE 21, 1890, AND SEPTEMBER 27,

1890, FOR REFERENCE OF THESE CASES TO THE MASTER, AND IN REFUSING TO PERMIT APPELLANT KNEELAND TO PROVE THE FACTS SET FORTH IN SAID MOTIONS, AND IN HIS AFFIDAVIT FILED IN CONNECTION WITH HIS MOTION OF SEPTEMBER 27, 1890.

Enough has already been shown to prove that upon the reversal of the former decrees, these cases ought, in equity, to have been referred to the Master, to the end that the new decrees might be based upon *actual facts*, rather than mere arbitrary percentages, proportions and averages, as these new decrees are. Upon such a reference it could not have happened that the two new decrees would have differed in method and basis of computation, as these decrees do differ; in fact, no two decrees would have been necessary, a single report of the Master, and one decree upon that report, would have covered all the claims included in these two decrees.

The affidavit that appellant Kneeland filed in the Circuit Court on September 27, 1890, in connection with his motion for reference to the Master, contains matter that ought, in equity, to have been investigated and considered by the Circuit Court in making up the new decrees. The affidavit referred to appears in the record of these appeals. (Record, pp. 24, 25.)

While not unmindful of the fact that this Court in *Stewart* v. *Salamon*, 97, U. S., 362, and again in *Humphrey* v. *Baker*, 103 U. S., 737, has decided that reversed cases cannot be reopened in the Court below for the filing of new pleadings and the introduction of new defenses, it is insisted that the matters disclosed by the motions and affidavit of Kneeland do not come within this rule.

It must be remembered that neither Kneeland, nor any one of his counsel, were or could be familiar with

the facts and transactions occurring in regard to this railroad in 1883. The earliest date on which any one now connected with this litigation on the side represented by Kneeland became connected with the litigation, was October, 1884, at which time the writer of this brief became counsel for the bondholders' committees. The facts disclosed by Kneeland's affidavit came to his knowledge since the reversal of the former decrees. These facts, if true, ought certainly to have had strong bearing on the Court below in considering the proposition urged by counsel for appellees, to assess against Kneeland interest from the date of the reversed decrees. If it is true that the bondholders now represented by Kneeland did, in 1883, request these appellees, through their attorneys, to remove their equipment, and did request their trustee, the Central Trust Company, to procure an order of the Court compelling appellees to retake their equipment, what possible equity is their in favor of these appellees to induce a Court of equity to assess $13,943.01 against Kneeland by way of punishment for appealing from and procuring the reversal of a wrongful decree?

If this Court had known the facts averred in this affidavit, and if it had considered the further fact, disclosed by the records of the original appeals, that no receivership was ever established under, or extended to, the consolidated suit brought to foreclose the mortgage on the St. Louis Division, extending from Kokomo, Indiana, to East St. Louis, Illinois; and that that consolidated suit never was consolidated with the suit to foreclose the first mortgage of the Toledo, Delphos and Burlington Railroad Company, under which Craig was appointed Receiver, would this Court have decided that the St.

Louis Division bondholders must pay for the rent and repairs of appellees' equipment while in possession of a receivership not asked for or obtained by them or in their behalf? The same principle that eliminated the Dwight receivership applies to the St. Louis Division. This equipment was never seized or held by a Receiver appointed under the suit to foreclose the mortgage on that division. The Central Trust Company and Thomas A. Hendricks, as trustees in that mortgage, never procured any receivership. Why should the bondholders secured by that mortgage be made to pay rent to these appellees on the ground of an implied contract growing out of the use of this equipment by a receivership established under another and independent foreclosure suit not affecting the St. Louis Division? The exceptions of Kneeland, found in the record of Cause No. 252, October Term, 1889, on pages 552 to 554, would seem broad enough to cover this question. It would, probably, have been considered and passed upon but for the fact that this Court, seems from the language of the decision to have been of the impression that the consolidated suit to foreclose the mortgage on the St. Louis Division was consolidated with the suit to foreclose the mortgage on the Toledo Division, and that therefore the receivership established under the suit to foreclose the mortgage on the Toledo Division became, by such consolidation, a receivership on and in behalf of the St. Louis Division.

If this point was not considered or passed upon on the former appeals because not expressly and specifically set forth in the exceptions; would not equity and exact justice require that Kneeland be now permitted to present the point for consideration and decision? By so doing, Kneeland would not ask this Court to announce

any new principle of decision, or to make any change or modification of the principles announced in the decision reversing the former decrees. He would only be asking this Court to apply the exact principle announced in that decision to the facts appearing in the records. It is abundantly evident, from the records in the former appeals, that it was the fixed purpose and intention of the bondholders by their committees, and of Kneeland, as their representative, to object, protest against and except to *every ruling* and every step taken by the Court looking towards requiring these bondholders to pay anything whatever for the use of this equipment, left on the railroad by these appellees, without contract with the Court or the Receiver, in spite of the request of the bondholders to remove it, until compelled by the order of the Court to retake possession of it. In the exceptions filed by the bondholders' committees and Kneeland, they declared their purpose to except to every finding of the Master by the use of these words: "and now except to each and every of the Master's findings and report herein." As has already been shown, by these findings of the Master, large sums of money were apportioned to and charged against the St. Louis Division. It cannot but seem harsh to now compel the St. Louis Division bondholders to pay a large sum of money to these appellees *if* the very same principle announced by this Court in reversing the former decrees applied to the facts actually existing and disclosed by the records would prevent appellees from recovering anything for the use of their equipment on the St. Louis Division.

Under the principles of equity jurisprudence established by the decisions of this Court in *Fosdick* v. *Schall*,

99 U. S., 252–255; *Huedikoper* v. *Locomotive Works*, 99 U. S., 260; *Burnham* v. *Bowen*, 111 U. S., 782, 783; *Union Trust Company* v. *Illinois Midland Company*, 117 U. S., 479, 480; *Porter* v. *Pittsburg Steel Co.*, 120 U. S., 671; *St. Louis, Alton and Terre Haute R. R. Co.* v. *Cleveland, Columbus, Cincinnati and Indianapolis Ry. Co.*, 125 U. S., 672–674 and *Toledo, Delphos and Burlington R. R. Co.* v. *Hamilton*, 134 U. S., 301, 302, it would seem difficult to define the exact ground upon which appellees are, in equity, entitled to any recovery in priority over first mortgage bonds. In many of these cases, the equity arising upon the ground of *implied contract* was as strong as it is in these cases, in some of them it was very much stronger. But it is far from my purpose or desire to reargue the points decided by the decision of this Court on the former appeals. I only desire, in behalf of Mr. Kneeland and the bondholders represented by him, to ask this Court to apply the principle established by that decision, touching the Dwight receivership, to the *actual facts* existing with relation to the St. Louis Division.

III.

THESE DECREES OF JUNE 21, 1890 AND SEPTEMBER 27, 1890, ARE NOT IN OBEDIENCE TO, AND COMPLIANCE WITH, THE DECISION AND MANDATES OF THIS COURT.

In *Stewart* v. *Salamon* and *Humphrey* v. *Baker*, *supra*, it was held that new decrees rendered upon mandates reversing the former decrees, must be in exact obedience to the mandates of this Court, otherwise they will be reversed. In the foregoing discussion of the first and second assignments of error, substantially all has been said that need be said in support of this assignment of error.

Appellant Kneeland contends that these new decrees are not in obedience to the decision and mandates of this Court:

First. Because these decrees contain $13,943.01 of interest wrongfully allowed against appellant Kneeland upon a large part of the amount found due to appellees by the new decrees; said interest being calculated from the date of the *reversed decrees.* The interest allowed to each of these appellees, excepting only George William Ballou, was calculated from April 5, 1886.

Second. Because these new decrees are not based upon *actual facts*, but are the results of arbitrary percentages and averages computed by counsel for appellees upon the assumption that the rent, repairs and damages that accrued during the Dwight receivership were precisely the same in amount per month as the rent, repairs and damages that accrued during the Craig receivership: and because these two decrees, involving precisely the same principles, points and rights, are not framed and computed upon the same basis; which could not result if these decrees were framed in obedience to the mandates of this Court.

Third. Because the Circuit Court erred in refusing to refer the claims of these appellees to the Master, with directions to ascertain, from the testimony, and report the exact and true amount due to each of these appellees after deducting and striking out *the actual rent, repairs and damages that accrued during the four months from August 1, 1883, to December 1, 1883:* And because the Circuit Court erred in refusing to permit appellant Kneeland to prove by competent testimony the averments and facts set forth in his motion and affidavit filed September 27, 1890.

The decision and mandates of this Court certainly contemplated an exact ascertainment of the facts necessary to a strict compliance with the mandates; and the rendition of new decrees in exact accordance with the *actual facts so ascertained.* It is very evident that these decrees are not of that character.

Appellant Kneeland, therefore, asks that these decrees may be reversed.

Respectfully Submitted,

JOHN M. BUTLER,

Of counsel for appellant
Sylvester H. Kneeland.

Indianapolis, Ind., January 19, 1891.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1,539.

SYLVESTER H. KNEELAND, APPELLANT,

v.

THE AMERICAN LOAN AND TRUST COMPANY, AND E. B. PHILLIPS, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF THE APPELLEES.

HENRY D. HYDE,
of counsel.

STATEMENT OF FACTS.

The appeal in this case and that in No. 1540, Kneeland *v.* Ballou *et al.*, are sequels to a long litigation culminating in this court in the cases of Kneeland *v.* American Loan and Trust Company, and Kneeland *v.* Ballou, respectively, Nos. 252 and 1537, October term, 1889. These cases were argued together, and the decision and opinion of this Court are reported in 136 U. S. 89.

The mandates of this court, after reciting the decree appealed from, and ordering and decreeing that it should be reversed with costs, continued: —

"And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to strike out all allowances for rental prior to Dec. 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent thereto."

Record, page 4.

Following the issuing of these mandates, proceedings were had in Circuit Court for the District of Indiana in behalf of all the parties except the American Loan and Trust Company, and E. B. Phillips, trustee, in June, 1890, in behalf of those parties in September, 1890. And the court entered a decree on Sept. 27, 1890, allowing the American Loan and Trust Company, and E. B. Phillips, trustee, the following sums: —

TO THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON.

From the Toledo Division: —	
For eight months' period (from Dec. 1, 1883, to Aug. 1, 1884),	$11,914 32
For five months' period (from Aug. 1, 1884, to Jan. 1, 1885) .	8,931 79
Interest on five months' period (from April 5, 1886) . .	2,232 95
Total from Toledo Division	$23,079 06
From the St. Louis Division: —	
For eight months' period	$11,348 40
For five months' period	8,507 89
Interest on five months' period (from April 5, 1886) . .	2,126 97
Total from St. Louis Division	$21,983 26
Total from both divisions	45,062 32

TO E. B. PHILLIPS, TRUSTEE.

From the Toledo Division: —	
For eight months' period	$2,396 52
For five months' period	3,197 12
Interest on five months' period (from April 5, 1886) . .	799 28
Total from Toledo Division	$6,392 92
From the St. Louis Division: —	
For eight months' period	$2,282 69
For five months' period	3,045 39
Interest on five months' period (from April 5, 1886) . .	761 35
Total from St. Louis Division	$6,089 43
Total from both divisions	12,482 35

Record, page 29.

I.

The rules as to the construction of mandates have been long settled by this court, and under these rules the construction of the mandate is clear.

Supervisors v. *Kennicott*, 94 U. S. 498.
Stewart v. *Salamon*, 97 U. S. 361.
Humphrey v. *Baker*, 103 U. S. 736.
Clark v. *Keith*, 106 U. S. 464.
Mackall v. *Richards*, 116 U. S. 45.
Chaffin v. *Taylor*, 116 U. S. 567.

In the case first cited Chief Justice Waite states the law: —

"It is settled in this court that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court, after the mandate of this court."

And in *Stewart* v. *Salamon*, the same judge said: —

"An appeal will not be entertained by this court from a decree entered in a Circuit Court, or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error."

This statement again received the approval of the court in *Mackall* v. *Richards*, above cited.

In the original case it appeared that Mr. Dwight was appointed receiver on the first day of August, 1883, at the instance of one Braman, a judgment creditor; that Mr. Dwight was subsequently removed, and Mr. Craig appointed Dec. 1, 1883, at the instance of the mortgagees or bondholders. The question in the former case was whether the claims of the appellee should be given priority over the claims of the mortgage bondholders in the distribution of the proceeds of foreclosure sale, and if so, from what date. The appellees claim they should be allowed from Aug. 1, 1883, the date of the appointment of Dwight as receiver. The court decided that they should be allowed from Dec. 1, 1883, the date of the appointment of Craig as receiver. The mandate reads, "To strike out all allowances for rental prior to Dec. 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow

the rental as fixed for the time subsequent thereto." In other words, it is the same as though the court had said simply, strike out all allowances prior to Dec. 1, 1883, and allow rentals as fixed for the time subsequent thereto. This is both clear and definite, and was followed by the Circuit Court in its decree.

II.

THE AMOUNTS DECREED TO THESE APPELLEES BY THE CIR, CUIT COURT ARE CORRECT.

The calculations upon which the amounts originally decreed by the Cirruit Court on April 5, 1886 (Former Record, page 570), were based are shown in schedule S attached to the report of William P. Fishback, master in chancery, rendered to the court on Feb. 23, 1886 (Former Record, page 538).

The portions of schedule S applicable to these appellees is as follows: —

SCHEDULE "S," WITH MASTER'S REPORT UNDER ORDER DEC. 8, 1886.

AMERICAN LOAN AND TRUST COMPANY.

Distribution of aggregate amount due this company in respect of net rentals and repairs, and for cars destroyed under series "F," "G," "H," "I," "K," "L," "M," in the Boston Car Trust, and under series "D" in the Massachusetts Car Trust: —

DISTRIBUTION AS TO TWELVE MONTHS.

Net rentals for twelve months	$58,047 50
Repairs for twelve months	4,152 03
Cars destroyed for twelve months . . .	9,527 56
Aggregate amount	$72,627 09

Divisions liable thereto.	Per cent.	Computed Amount.	Total.
Toledo Terminal	.40	$290 51	
Toledo Division	23.79	17,277 98	
Dayton Division	12.98	9,426 99	
Dayton and S. E. Division	32.67	23,727 27	
Iron Railroad Division	1.98	1,438 02	
Cincinnati Di ision	1.36	987 73	
Cincinnati Northern Division	4.16	3,021 29	
St. Louis Division	22.66	16,457 30	
	100.00		$72,627 09

DISTRIBUTION AS TO FIVE MONTHS.

Net rentals	$15,771 12
Repairs	894 30
Cars destroyed	923 77
Aggregate amount	$17,589 19

Divisions liable thereto.	Per cent.	Computed Amount.	Total.
Toledo Terminal	.85	$149 51	
Toledo Division	50.78	8,931 79	
St. Louis Division	48.37	8,507 89	
	100.00		$17,589 19

Former Record, pages 541, 542.

E. B. PHILLIPS.

Distribution of the aggregate amount due the above in respect of net rentals and repairs under series "H" in the Massachusetts Car Trust.

DISTRIBUTION AS TO TWELVE MONTHS.

Net rentals	$14,076 00
Repairs	1,034 47
Agregate amount	$15,110 47

Divisions liable thereto.	Per cent.	Computed Amount.	Total.
Toledo Terminal	.40	$60 44	
Toledo Division	23.79	3,594 78	
Dayton Division	12.98	1,961 34	
Dayton and S. E. Division	32.67	4,936 59	
Iron Railroad Division	1.98	299 19	
Cincinnati Division	1.36	205 50	
Cincinnati Northern Division	4.16	628 60	
St. Louis Division	22.66	3,424 03	
	100.00		$15,110 47

DISTRIBUTION AS TO FIVE MONTHS.

Net rentals		$5,865 00	
Repairs		431 03	
Aggregate amount			$6,296 03

Divisions liable thereto.	Per cent.	Computed Amount.	Total.
Toledo Terminal	.85	$53 52	
Toledo Division	50.78	3,197 12	
St. Louis Division	48.37	3,045 39	
	100.00		$6,296 03

Record, pages 551, 552.

The twelve months' period referred to is from Aug. 1, 1883, to Aug. 1, 1884, when the receivership was discharged (Former Record, page 435) as to part of the system, and the five months' period is from Aug. 1, 1884, to Jan. 1, 1885, when the rolling stock of the appellees was redelivered to them, in accordance with an interlocutory decree of the court. (Former Record, page 301.) The claimants were paid on the basis of these figures the amounts charged against all the divisions except the Toledo and the St. Louis Division. There remained due from these divisions to the appellees therefore for rentals and repairs: —

TO THE AMERICAN LOAN AND TRUST COMPANY.

From the Toledo Division for twelve months' period	$17,277 98
" " " five months' period	8,931 79
From the St. Louis Division for twelve months' period	16,457 30
" " " five months' period	8,507 89
Total from both divisions	$51,174 96

TO E. B. PHILLIPS, TRUSTEE.

From the Toledo Division for twelve months' period	$3,594 78
" " " five months' period	3,197 12
From the St. Louis Division for twelve months' period	3,424 03
" " " five months' period	3,045 39
Total from both divisions	$13,261 32

The amounts of $51,174.96 and of $13,261.32, ordered to be paid to these appellees by the former decree of the Circuit Court (Former Record, pages 570, 571), were made up as shown above.

On the remanding of the case, the problem presented to the court was, how to extract from these sums the charges for the period of four months prior to Dec. 1, 1883. The method chosen after argument and consideration was to deduct one third of the allowance made for the twelve months' period, and this rule was applied without modification in every case except one series of the Massachusetts Car Trust, referred to hereafter; and the amounts decreed for the period from Dec. 1, 1883, to Aug. 1, 1884, to the appellees by the decree of the Circuit Court now appealed from were thus obtained, and are consequently two thirds of the amounts formerly decreed.

As to the method of computation chosen — a horizontal cut — it is to be admitted, in the first place, that it may not be an absolutely accurate one, but it was the fairest and probably the most accurate attainable under the circumstances. The period to be considered was seven years prior to the date of the decree here appealed. If it ever was possible to determine exactly what amount of the rentals, repairs and reimbursements for destruction which were allowed accrued prior to Dec. 1, 1883, and what amount accrued after, it had long since become practically impossible. Whatever evidence had not been collected and tabulated could be collected only in such imperfection and scant quantity as to render reasoning and calculating therefrom more deceptive and inaccurate by far than were the results of the method adopted. For it is to be noticed that whether the court attempted to determine all the charges allowed for the period prior to Dec. 1, 1883, and then to deduct them from the total amount previously allowed or attempted to determine all the charges allowable after that date, in either event the value of the result would depend on the completeness of the details.

Unless all, or very nearly all the items properly chargeable, could be determined, the investigation would be valueless as a basis for a decree.

On the other hand, the method chosen, though perhaps not exactly accurate, was substantially so. The bulk of the sums allowed was for rentals. All the rolling stock which was on the road at the beginning of the twelve months' period was on it at the close of that time, with the exception of what had been destroyed while in use, and this exception was so slight that the inaccuracy due to it might be disregarded without substantial injustice. While the amounts allowed for repairs and destroyed cars were not similarly distributed evenly throughout the twelve months, the total of sums allowed on those accounts was not large as compared with that allowed for rentals. (See schedules on pages 77 and 85 of record.) Further, the inaccuracy, if any, undoubtedly worked to the advantage of the appellant. As the roling stock became older, and as the railroad tracks fell into worse condition with the lapse of time, more frequent and extensive repairs on the rolling stock became necessary, and more accidents resulting in the destruction of cars occurred. There cannot be a reasonable doubt that of the total amounts allowed for repairs and destroyed cars from Aug. 1, 1883, to Aug. 1, 1884, less than one third accrued in the first four months. It may fairly be said, therefore, that the method of computation adopted produced a result as nearly accurate as any then possible, and that such inaccuracy as there was did not prejudice the appellant. The claim of his counsel for a reference to a master was in furtherance of no desire for substantial justice, but with a view to making still more interminable the delays in the payment of the sums due the appellees.

The allowance made in the case of series D of the Massachusetts Car Trust stands on special grounds. In that series the amount due for destruction was comparatively large, be-

ing for the twelve months' period $4,989.42, while the net rentals were $9,519 less than twice as much.

Record, page 66.

And it could be shown when every dollar of that charge accrued. On March 11, 1884, a train of three cars belonging to this series was derailed and the cars destroyed. Their value, at that time, computed by deducting nine per cent from their value when new, a year and half before, was found by the master to be $7,068.35.

Record, page 53, at bottom.

By the division of the charges into the twelve months' period, and the five months' period, twelve seventeenths of this amount became chargeable to the former period. This was the sum of $4,989.42 spoken of above. As this allowance was so considerable a part of the total allowance for series D, and accrued wholly after Dec. 1, 1883, it seemed unjust to deduct one third of it. And here the injustice could be readily prevented. In other words, it was possible here to follow a mode of computation more nearly absolutely accurate than that adopted in other cases; and as it was possible, justice required it.

III.

INTEREST WAS RIGHTLY ALLOWED ON THE AMOUNT DUE IN RESPECT OF THE FIVE MONTHS' PERIOD.

As already stated, on or about Aug. 1, 1884, many of the divisions of the system were released from the receivership.

Former Record, page 435.

From that time, therefore, till Jan. 1, 1885, when the rolling stock was surrendered, it was necessary to keep a separate account of the amount due the appellees. For while

the proportion of the claims of the appellees chargeable to the divisions represented by the present appellants was less than one half till Aug. 1, 1884, after that time the whole amount was so chargeable, those divisions only remaining in the hands of the receiver. Accordingly, the Circuit Court ordered separate calculations to be made, laying down separately the percentages to be paid by the appellant for rentals for the respective periods, and ordering likewise as to the repairs that twelve seventeenths be charged in one account and five seventeenths in the other.

Former Record, page 436.

This mode of calculation and accounting was accordingly followed, and the amounts separately stated by Master William P. Fishback.

Former Record, page 495 *et seq.*

On exceptions to the report just referred to, the Court ordered a horizontal reduction of fifteen per cent.

Former Record, page 536.

And that calculation having been made,

Former Record, page 539,

the Court made its final decree.

Former Record, page 570.

This decree, it is true, states a single total as due to each of the appellees, but that total was arrived at by adding together the two totals of the periods previously arrived at, and necessarily so, separately. And the latter sums were ascertainable from the record.

Rule 23 of this court, as to the allowance of interest, is as follows: —

1. In cases where a writ of error is prosecuted to this court and the judgment of the inferior court is affirmed, the interest is to be calculated and levied from the date of the

judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

In this case the effect of the decision reported in 136 U. S. was to affirm the allowance for the five months' period. As was said by this court in *Illinois Central Railroad* v. *Turrill*, 110 U. S. 301, 303, in allowing interest claimed for a period prior to the date of the decree last appealed from : —

"The cases were only sent back to ascertain how much should be deducted from those decrees for errors in the accounts as there stated. . . . Those decrees may very properly be considered as affirmed in part and reversed in part."

Since, therefore, one portion of the decree below — that awarding a fixed sum to the appellees for the five months' period — was affirmed without change, it was equitable and within the spirit of the rule that interest on that sum should be allowed from the date of the former decree.

IV.

The endeavor of the appellant in this case seems to have been merely to interpose delay in the payment of what was justly due to the appellees. The applicability of the second section of rule 23 to the present case is therefore suggested, if the Court deem it appropriate to a decree in equity.

HENRY D. HYDE,

Of Counsel for the American Loan and Trust Company, and E. B. Phillips, Trustee.